IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 266 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

VASANTRY J KHAMKATI

Versus

STATE OF GUJ

Appearance:

1. Criminal Revision Application No. 266 of 1992

MR ARUN H MEHTA for Petitioner No. 1

Mr S J Dave, APP for Respondent No. 1

NOTICE SERVED for Respondent No. 2

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 24/02/2003

ORAL JUDGEMENT

This is a revision application under section 397 read with section 401 of the Code of Criminal Procedure, 1973 (for short, 'the Code') challenging the judgment and order passed in Criminal Appeal No.74/86 dated 24.8.1992

under which the learned Appellate Judge dismissed the said appeal of the present petitioner and confirmed the judgment and conviction order recorded on 3.9.1986 in criminal case no.1927/84 convicting the present petitioner for offence under section 7 read with section 16 of the Prevention of Food Adulteration Act, 1954 and sentenced him to undergo S.I. for three months. The petitioner was also directed to pay fine of Rs.500/- and in default of payment of fine, he was required to suffer further S.I. for 15 days.

2. The facts of the case of the original complainant before the trial court may be briefly stated as follows:

That original complainant-Ambalal K Patel was working as Food Inspector at Bhavnagar. He visited the shop of the petitioner on 7.3.1984 at 4 p.m. The petitioner was present there and he was selling milk. The petitioner introduced himself as Food Inspector and also told him that he wanted to purchase cow milk for the purpose of sending the sample for chemical analysis. Accordingly he collected milk in three bottles and then he sealed the same and thereafter one of the bottles was sent for analysis to the Public Analyst and on receiving the report from the public analyst, he placed the papers for sanction. After obtaining consent for prosecuting the petitioner, a complaint was filed before the learned Chief Judicial Magistrate First Class at Bhavnagar. There it was registered as criminal case No.1927/84.

2. The learned Magistrate conducted trial and at the end of the trial, learned Magistrate found that the petitioner had committed offence by selling adulterated milk to the complainant and, therefore, the learned Magistrate held the petitioner guilty for the offence and inflicted punishment on him as aforesaid. Feeling aggrieved by the said judgment and conviction of the trial court, the petitioner herein preferred the aforesaid criminal appeal unsuccessfully. Hence this revision.

3. Here when the revision was received, rule was issued. At the hearing, Mr A H Mehta, learned Sr.Advocate has argued the matter on behalf of the petitioner and Mr S J Dave, learned APP has argued the matter for the respondents. Learned Advocates for the parties have taken me through evidence on record and through the observations made in the two judgments of the two courts below.

4. It is not much in dispute that on 7.3.1984 at

about 4 p.m. Food Inspector, Bhavnagar had visited the shop of the petitioner and had collected samples of milk. It is also not much in dispute that the sample was analysed by Public Analyst and as per the report of the public analyst, the sample was found to be adulterated.

5. Learned Advocate for the petitioner has taken up three contentions on merit for assailing the two judgments of the two courts below. At the first instance, it has been contended that though the accused of this case and the accused in Criminal Revision Application No.267/92 are different, and though the samples were taken at different places and though the two offences are distinct and different and though the two different complaints were filed and two separate trials were undertaken and though the court has recorded two separate judgments, at the first instance the Sessions Court has disposed of the two appeals by consolidated judgment. It is the say of the learned Advocate for the petitioner that the Code of Criminal Procedure never provides for consolidation of such criminal appeals and, therefore, the approach of the Sessions Court is ex-facie illegal.

6. In the present case, we find that learned Advocate for the petitioner is right in arguing as aforesaid. However, on the one hand, evidence in both the matters is almost similar and the Appellate Court has considered the evidence from that angle and it has not caused any prejudice to the interest of the petitioners and, therefore, the judgment of the Sessions Court cannot be treated to be illegal on that count. Even if we find that the approach of the Sessions Court was illegal, the only proper remedy is to remand the matters to the Sessions Court for appropriate consideration and decision separately by two separate judgments.

7. The second contention raised on behalf of the petitioner is that the Prevention of Food Adulteration Act, 1954 (for short, 'the Act') and the Prevention of Food Adulteration Rules, 1955 require that the sample to be taken should be taken after stirring the food product. It has been contended that in the present case, there is no evidence to show that either the complainant or the petitioner had stirred the food product, i.e. the milk, while taking sample at the relevant point of time. For this purpose, the learned Advocate for the petitioner has drawn my attention to the provisions made in the Prevention of Food Adulteration Rules, 1955 (for short, 'the Rules).

8. In the present case, we find that the complainant has given evidence before the trial court at exh.5. There he has stated that he asked the petitioner to stir the milk and then to sell it to the complainant. However, the matter rests there and there only. The complainant has not stated further that the petitioner had carried out the said direction of the complainant and had actually stirred the milk while the sample was collected. Apart from the said position, the complainant has never deposed before the court on oath that he himself had stirred the milk or that the milk was stirred either by the petitioner or by any other person present there. Therefore, the evidence about stirring of milk is absent in the present case.

9. In this aspect of the case, we can consider a decision in the case of State of Gujarat v. H R Momin, reported in 2000(1) GLR 572. There this court has considered a fact that the sample of food oil was taken without stirring.

9.1. In para 18 of the said judgment, it has been observed that so far as milk is concerned, since the milk is of a lower density than the other constituents of milk, it tends to rise to the surface. Thorough mixing of milk with a proper instrument which will reach the entire depth of the liquid is essential to ensure a representative sample of the entire batch. Then this court has further observed as to how the food can be stirred.

10. As said above, the complainant has not stated that he has stirred the milk. He has also not stated that the petitioner has stirred it. The panch witness has not supported the complainant to any extent and, therefore, he has been treated hostile. There is no other material to show that the milk was actually stirred before the sample was collected. It is true that it has been stated in the complaint that the milk was stirred at the time when the sample was collected but the complaint cannot be treated to be substantive piece of evidence but it can be used to corroborate the evidence of the complainant. When the complainant has not said anything about stirring of milk, the said part of the complaint cannot treated to be a substantial piece of evidence against the complainant. Even in panchnama Exh.35 also it has not been stated that the milk was stirred when the sample was collected. Panchnama is an important evidence. When the evidence does not say that the milk was stirred, then the statement made in the complaint or in the panchnama that the milk was stirred, cannot be

used as evidence against the petitioner. There is no other evidence to show that the milk was stirred at the time when the sample was collected. Therefore, there is apparent violation of the requirement and consequently it cannot be said that the sample collected represented full quantity of the milk. In that event, the petitioner could not have been convicted by the trial court and the conviction could not be upheld by the appellate court.

11. In the case of Mansingh Yadav v. State of Gujarat, reported in 1985 (2) GLR 895, this court has taken a view that article of food must be churned or shaken so as to render it homogeneous and to render the part a representative of the whole. It is true that in the case of Food Inspector, Municipal Corporation Baroda v. Madanlal Sharma, reported in AIR 1983 SC 1976, the Hon'ble Supreme Court did not agree with the view expressed by this Court that churning is required to be done by some instrument or that churning done by hand would not meet with the requirement of making sample homogeneous and representative. The Supreme Court however, said that churning by any instrument or by hand must be such that the sample must become homogeneous and representative so that the analysis can furnish reliable proof of nature and contents of the article of food under analysis.

12. The third contention raised by the learned advocate for the petitioner is that the bottles in which the milk was collected were not sterilized. Here we can consider the provisions made in the said rules. Rule 14 of the said rules requires that the samples of food for the purpose of analysis shall be taken in clean and dry bottles or jars. Therefore, the requirement that the bottles should be clean and dry clearly appears to be mandatory. This is with a view to ensure that the food placed in the bottle or jar does not get adulterated on account of the ingredients already present in the said jar or in the bottles. In the present case, we find that so far as the complainant is concerned, his evidence Exh.5 does not show or say that the bottles in which the samples were collected were clean and dry. The witness has not said anything in the examination-in-chief. In cross-examination he has deposed that the bottles were received from the office and that they were not cleaned in his presence, that he did not know as to when and how they were cleaned. This shows that the bottles in question were not cleaned by him. It also shows that they were not cleaned before him. Therefore, he has no idea as to how and when the bottles were cleaned and who

cleaned the same.

13. Therefore, we can turn to other evidence also. The panch witness has not supported the case of the complainant to any extent. Then there is evidence of other witnesses who were not present at the relevant point of time. Therefore, their evidence will not be useful for any purpose. The complainant has examined Ahmed Karimbhai Qureshi at exh.38 in order to show that the bottles in which the samples collected were cleaned and dried. This witness has deposed that he used to clean bottles by means of detergent powder. He was a peon in the said office. He also states that after cleaning bottles and after drying the same, he used to hand over the same to the head clerk and thereafter the head clerk used to hand over the bottles to the concerned Food Inspector. Now so far as the bottles in which the samples were collected by the present complainant and which are the subject matter in this case, there is no evidence as to whether these bottles were really cleaned and dried by this peon. The evidence given by the peon is in a very general form to show that this was the function of this peon. But he never says that the bottles used for the purpose of collecting samples were actually cleaned and dried by him. It is not much in dispute that the bacteria would play an important role in maintaining composition of milk. The addition of bacteria, at times, may change the whole composition of milk. This is not unknown. There is no evidence to show that the bottles were clean and dry. In my opinion, this is a mandatory requirement of law because when the bottles are not cleaned and dried, then the report of the Public Analyst may also not be the one admissible in evidence as it may not really be a matter of opinion with respect to the actual milk collected from the accused person. For the purpose, we refer to certain decisions also.

14. In the case of State of Gujarat v. Babu Lavji Jalia, reported in 1996 (1) GCD 411 (Guj.), this court was required to deal with a similar situation in an acquittal appeal. There this court has observed in para 4 of the judgment that rule 14 of the said rules is mandatory and it is the duty of the prosecution to prove by leading positive evidence that the bottles were cleaned and dried before the sample was taken by the food inspector, and it is, therefore, the duty of the prosecution to prove beyond reasonable doubt that all ingredients or provisions that are to be proved as per law and especially provisions which are mandatory in nature have got to be proved beyond reasonable doubt.

That the manner of sending the sample for analysis is prescribed in Rule 14. It is very clear from the said rules that the sample of food for the purpose of analysis should be taken in clean and dry bottles and other suitable containers. There the rule was held to be mandatory and there was no dispute about the said fact. This court found that non-compliance of the mandatory rule was fatal to the prosecution. It is true that the above matter had come to this court by way of acquittal appeal. But the facts remain the same.

15. In the present case also the evidence is lacking on the point that the bottles in which the food was collected were clean and dry. Even evidence of the peon is in a general form, that it was his function to clean and dry the bottles and then to hand them over to the head clerk of the office. However, the bottles which were used by the complainant in the present case, are not proved to be the bottles which were cleaned and dried by the peon. In other words, there is no evidence to show from the bottles which were used for the purpose of collecting the samples were dried or cleaned by the peon in question. It is not the case of the complainant that he himself did it. It is not his case that it was done in his presence. Therefore, there is reasonable doubt as to whether or not the bottles in question were really dried or cleaned before they were used by the food inspector for collecting the samples. As said above, the provisions made in rule 14 is held to be mandatory by this court and hence there is no reason for this court to take a different view than the one earlier taken by this court. Once it is held that rule 14 is mandatory and once it is found that there is reasonable doubt as to the observance of the said provisions of the said rule in the present case, then naturally and necessarily the benefit of the said reasonable doubt will go in favour of the petitioner. In other words, the petitioner will be entitled to the benefit of reasonable doubt on the point as to whether or not the bottles in which the samples were collected were really cleaned and dried. I am of the opinion that the said mandatory provision has not been proved to have been complied with. There is legal lacuna in the evidence produced by the complainant before the trial court and, therefore, the petitioner herein is entitled to get benefit of reasonable doubt.

16. In the present case, we find that on the one hand, it is not established on record that the food sample was actually stirred either by the complainant or by the petitioner. On the other hand, it is not

established on record that the bottles in which milk was collected were cleaned and dried.

17. Therefore, there is apparent violation of mandatory requirement of law and rule and, therefore, it is not possible to sustain the conviction imposed on the petitioner. It is true that the two courts have recorded concurrent finding of facts. At the same time, it is also required to be considered that there was absolutely no material on record to show that the milk was stirred before the collection of the samples. Similarly, there was no evidence on record to show that the sample of milk was collected in dry and clean bottles. When the findings of fact have been recorded by the two courts below are findings of fact without any evidence on record, then in that event, the said findings are required to be treated to be illegal and perverse and when the findings of fact recorded by the two courts below are found to be illegal and perverse, it becomes the duty of this court to exercise revisional jurisdiction and to pass legal orders in order to do substantial justice to the parties. This can be done by allowing the revision application and by setting aside the conviction and sentence imposed by the trial court and confirmed by the Sessions Court.

18. For the foregoing reasons, this revision application is allowed. The impugned judgment and conviction order recorded on 3.9.1986 in criminal case No.1927/84 by the learned Chief Judicial Magistrate, Bhavnagar and confirmed by learned Addl.Sessions Judge, Bhavnagar dated 24.8.1992 in Criminal Appeal No.74/86, is ordered to be set aside. He is acquitted of the offences punishable under section 16 of the Prevention of Food Adulteration Act, 1954. The applicant is on bail. His bail bonds are cancelled. Fine, if paid by the applicant, shall be refunded to the applicant. Rule is made absolute.

24.2.2003 [D P Buch, J.]
msp